Enloe Medical Center *and* Health Care Workers Union, Service Employees International Union, Local 250. Cases 20–CA–31806–1, 20–RC–17937, 20–RC–17938, and 20–RC–17939

April 14, 2006

ORDER GRANTING MOTION IN PART, DENYING MOTION IN PART

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 27, 2005, the National Labor Relations Board issued its Decision, Order, and Certification of Representative in this case,[1] finding that the Respondent violated Section 8(a)(1) of the Act by requiring employees to remove or cover badges that stated, "Ask me about our union" or "Ask me about SEIU" pursuant to its overbroad rule and by promulgating a rule that prohibited the placement of union literature in the employee breakroom. The Board also dismissed a complaint allegation that the Respondent violated Section 8(a)(1) by interrogating employees, and it overruled the Respondent's election objections and issued a certification of representative. On September 28, 2005, the Respondent filed a motion for reconsideration, and, on October 19, 2005, the General Counsel filed an opposition to the Respondent's motion.

In its motion, the Respondent requests that the Board reconsider its findings that the Respondent violated Section 8(a)(1) by (1) requiring employees to remove or cover badges that stated "Ask me about our union" or "Ask me about SEIU" pursuant to its overbroad rule and (2) promulgating a rule that prohibited the placement of union literature in the employee breakroom. The Respondent contends that the violations found differed from those alleged in the complaint and were not fully and fairly litigated.

1. Requiring employees to remove or cover badges

Regarding the first violation, paragraph 6 of the complaint alleged that the Respondent, through the conduct of five supervisors, "orally promulgated an overly broad no-solicitation rule by prohibiting employees from wearing union insignia in all areas of Respondent's facility." The record established, and it is undisputed, that the Respondent issued a memo to employees stating that the wearing of buttons or lanyard tags reading "Ask me about SEIU" violated the Respondent's policy. The memo instructed employees to "cease wearing these buttons in the interior of the hospital, unless they limit their use to non-patient care areas and areas where patients, families and visitors do not frequent, and only wear them during non-working time." The Board found that subsequent actions of certain supervisors, in requiring employees to cover the language "Ask me about our union!" on their lanyard tags or remove the tags pursuant to the rule set forth in this memo, violated Section 8(a)(1).[2]

"Under well-established precedent, the Board may find a violation not alleged in the complaint, even where the General Counsel has not filed a motion to amend, if the issue is closely related to the subject matter of the complaint and has been fully and fairly litigated."[3] Here the violation found was closely related to the complaint allegation and was litigated fully and fairly.

We recognize that the complaint alleged that the Respondent "orally promulgated an overly broad no solicitation rule." The Board did not pass on whether the employee conduct was "solicitation." Rather, the Board found that the written memo was unlawfully overbroad, and that the oral instructions to employees, pursuant to that memo, were thus unlawful. However, the lawfulness of the Respondent's memo was placed in issue at the hearing. After employee Kyle Harp testified that Supervisor Hosek had told her to remove her lanyard card that said, "Ask me about my union," Harp was asked on cross-examination if she had received the Respondent's above-quoted memo concerning the wearing of buttons or lanyard tags. The judge then asked the General Counsel's attorney if she was saying that the memo violated Section 8(a)(1). The judge repeated, "So then, in other words, you're also saying that this written policy is a violation?" The General Counsel's attorney replied, "Yes." No objection was raised to this statement.

Further, the Respondent itself linked its solicitation memo to its supervisors' actions ordering employees to

[1] 345 NLRB No. 54 (2005).

[2] In its motion, the Respondent also faults the Board for failing to discuss the specific circumstances of each instance in which a supervisor directed employees to remove their lanyard tags or cover the "Ask me about our union!" statement on the tags. However, in this respect the Board merely adopted the judge's unchallenged factual findings regarding the supervisors' statements. Indeed, the judge found it "unnecessary to recount the circumstances under which some committee members were confronted by their supervisors about this language on their cards, as each individual was simply made aware of the Respondent's position and was required to cover up the 'Ask me about' portion of the card or, in the alternative, to remove the card and simply wear the lanyard." Id., slip op. at 7 fn. 3. The Respondent did not except regarding this finding.

[3] *Desert Aggregates*, 340 NLRB 289, 292–293 (2003), citing *Williams Pipeline Co.*, 315 NLRB 630 (1994); *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

remove their lanyard tags. In its brief to the judge, the Respondent stated: "In order to fully analyze the individual allegations in the complaint regarding 'promulgation' of policy by individual supervisors, it is necessary to understand the basic policy *pursuant to which those supervisors acted*." (Emphasis added.) The brief then set forth relevant portions of the Respondent's above-quoted memo to employees and two other documents.[4] The brief argued that the Respondent's policy, stated in those documents, was lawful because, the Respondent contended, it barred lanyard tags with the "Ask me about SEIU" message only in areas where restrictions on solicitation were presumptively lawful.[5]

The Respondent's brief to the Board in support of exceptions similarly argued that its above-quoted memo to employees, as well as its two other documents regarding solicitation, were lawful because its policy prohibiting the wearing of tags bearing solicitations extended only to areas where restrictions on solicitation were presumptively lawful, and the employees who were told to remove their lanyard tags had been wearing them in a manner inconsistent with this policy. In finding the violation, the Board based its reasoning precisely on the issue that the Respondent's brief addressed: whether the Respondent's policy extended only to areas where restrictions on solicitation were presumptively lawful.

Accordingly, as it was alleged at the hearing that the Respondent's memo to employees regarding the wearing of lanyard tags reading "Ask me about SEIU" violated Section 8(a)(1) and the Respondent argued in its briefs to the judge and to the Board that the rule set forth in this memo was lawful, we find that the violation was litigated fully and fairly. Additionally, we find that the allegation that this memo violated Section 8(a)(1) was closely related to the complaint allegation that the Respondent, through the conduct of five supervisors, orally promulgated an overly broad no-solicitation rule by prohibiting employees from wearing union insignia in all areas of the Respondent's facility. Indeed, as noted above, the Respondent itself linked its solicitation memo to its supervisors' ordering employees to remove their lanyard tags. Consequently, we deny the Respondent's motion for reconsideration regarding this violation.

2. Restriction against posting union literature

Paragraph 7(a) of the complaint alleged that the "Respondent, by Gale Mitchell . . . about February 19, 2004, promulgated in writing an overly broad no-solicitation rule by prohibiting employees from distributing Union literature in the break room of Respondent's facility." At hearing, the General Counsel established that the Respondent sent an e-mail message to employees on February 19, 2004, stating: "As we discussed in our staff meetings, it is not appropriate for union literature to be . . . placed in our break room." The Board's decision found that the Respondent's e-mail message barring the placing of union literature in the breakroom violated Section 8(a)(1) because the message was facially discriminatory, i.e., it singled out union literature.

In its motion for reconsideration, the Respondent contends that this violation was not alleged or actually litigated and that, therefore, it had no opportunity to put on evidence regarding this violation.

We agree that the violation found differed from that alleged in the complaint. The complaint alleged an "overly broad no-solicitation rule." The Board found violative an allegedly discriminatory no-distribution rule. We need not address whether, notwithstanding this difference, the violation found was closely related to the violation alleged because, having reviewed the record, we find that the violation, as found, was not fully and fairly litigated.[6] Because the rule was alleged to be unlawful as "overly broad" and not alleged to be discriminatory, the Respondent would not have known to defend against a contention that the rule was discriminatory, and nothing that occurred at the hearing put the Respondent on notice of such an allegation. As the D.C. Circuit has observed, "the presence of evidence in the record to support a charge unstated in a complaint or any amendment thereto does not mean the party against whom the charge is made had notice that the issue was being litigated." *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983), cert. denied sub nom. *Ladies Garment Workers Local 222, v. NLRB*, 467 U.S. 1241 (1984).[7] Accord-

[4] The two other documents were a solicitation policy, adopted in 2002, and a January 2004 memo to management concerning lanyard tags.

[5] The brief asserted that there was no allegation that its 2002 solicitation policy or the statement of policy in its 2004 memo to employees was unlawful. However, the brief did not address the statement of the General Counsel's attorney at the hearing that the General Counsel was alleging that the memo violated Sec. 8(a)(1). Further, as indicated above, the brief in fact argued that the policy set forth in the memo was lawful.

Member Schaumber agrees that the Board's finding of this unfair labor practice was proper. He observes, however, that it would have been preferable for counsel for the General Counsel, having stated on the record that she was alleging a violation for the Respondent's memo, to have formally moved to amend the complaint accordingly.

[6] In Chairman Battista's view, the difference between the complaint and the violation found is a factor supporting the conclusion that the violation was not fully and fairly litigated.

[7] Our colleague faults the Respondent for failing to identify what additional evidence it would have introduced had it been placed on notice of the allegation on which the violation is based. The Board's rules, however, do not require a party filing a motion for reconsideration to make such a showing. See Board's Rules and Regulations, Sec.

ingly, to remedy any prejudice suffered by the Respondent, we shall remand this complaint allegation to the judge to provide the Respondent an opportunity to litigate whether the rule contained in its February 19, 2004 e-mail message to employees was discriminatory on its face and, therefore, violated Section 8(a)(1).[8]

ORDER

IT IS ORDERED that the Respondent's Motion for Reconsideration is denied insofar as it seeks reconsideration of the Board's finding that the Respondent violated Section 8(a)(1) of the Act by requiring employees to remove or cover badges that stated, "Ask me about our union" or "Ask me about SEIU" pursuant to its overbroad rule.

IT IS FURTHER ORDERED that the Respondent's Motion for Reconsideration is granted regarding the Board's finding that the Respondent violated Section 8(a)(1) of the Act by promulgating a facially discriminatory rule prohibiting the placement of union literature in the employee breakroom. Accordingly, the above-entitled proceeding is remanded to Administrative Law Judge Gerald A. Wacknov for the purpose of providing the Respondent an opportunity to introduce evidence and the parties to submit briefs regarding this issue.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a Supplemental Decision containing findings of fact, conclusions of law, and a recommended Order in accordance with this order of remand. Following service of the Supplemental Decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. April 14, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

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102.48(d). Moreover, the issue is not whether such evidence exists, but whether the Respondent was given a fair opportunity to present such evidence. It was not, and we will not prejudge what the Respondent will be able to do with that opportunity. Instead, we will furnish Respondent with the denied opportunity.

Additionally, Sec. 102.48(d)'s requirement, cited by our colleague, that a party identify evidence requiring reopening of the hearing applies only to motions to reopen the record. The Respondent, however, did not file a motion to reopen the record. Rather, it filed a motion for reconsideration. In that motion, it does not seek a reopening of the hearing. It seeks to have the Board reconsider its decision, this time limiting itself to the complaint as alleged. We have, sua sponte, taken the lesser step of remanding for further hearing on the issue of whether the evidence will support the violation that was previously found. In these circumstances, Sec. 102.48(d) does not apply to the Respondent.

Finally, although the Respondent's motion for reconsideration does not use the terms "extraordinary circumstances" or "material error," it clearly identifies the claimed errors in the Board's decision and the circumstances that assertedly compel reconsideration of them.

[8] Member Liebman finds the Respondent's due process arguments without merit and would deny this part of its motion for reconsideration as well. It is long settled that the Board may find and remedy a violation of the Act even without a specific allegation as long as the issue is closely related to the complaint allegation and is fully litigated. *Pergament United Sales*, 296 NLRB 333 (1989); *Brad Snodgrass, Inc*., 338 NLRB 917 (2003); *Golden State Foods Corp.*, 340 NLRB 382 (2003). Alleging a violation of Sec. 8(a)(1) of the Act, complaint paragraph 7(a), quoted above, clearly put the Respondent on notice that the lawfulness of the e-mail was at issue and refers specifically to the date on which the e-mail was disseminated. Moreover, the e-mail itself was introduced, without objection, into evidence at the hearing. The Respondent therefore can neither claim surprise that the lawfulness of the e-mail's content was at issue nor that it was deprived of an opportunity to present evidence about it. The Respondent's failure to proffer countervailing evidence at that time permitted the Board properly to draw the legal conclusion, based on the plain meaning of the words of the e-mail, that Respondent issued a facially discriminatory unlawful rule. The majority's reliance on *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1984) is misplaced. That case involved a finding of an 8(a)(3) discharge founded upon an allegation of an 8(a)(1) *threat* of discharge. Here, the violation is of the same class, involving the same section of the Act, and creating the same type of remedial liability as that alleged in the complaint. Moreover, the Respondent's motion neither claims material error or extraordinary circumstances warranting the Board's reconsideration of its original decision nor evidence justifying the reopening of the hearing, as expressly required by Rules and Regulations §102.48(d)(1). In these circumstances, Member Liebman finds no basis for reconsideration or purpose for remand.